

7-2200-9087-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In Matter of the Administrative
Penalty Order Issued to Buy-Rite
Oil Company, Inc.

FINDINGS OF FACT,
CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Richard C. Luis on September 22, 1994 at the offices of the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota. The record in this matter closed on October 3, 1994.

Richard P. Cool, Assistant Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Minnesota Pollution Control Agency ("Agency", "PCA"). Alexander (Al) Cusick, 16950 Hampton Court, Minnetonka, Minnesota 55345, appeared on behalf of Buy-Rite Oil Company, Inc. ("Buy-Rite", "the Company").

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of the Pollution Control Agency shall not be made until this Report has been made available to the parties to the proceeding for at least five days, and an opportunity has been afforded to each party adversely affected to comment on the recommendations. The Commissioner must consider such comments before issuing his final decision. Comments on this Report, if any, shall be filed with Charles W. Williams, Commissioner, Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155.

STATEMENT OF ISSUES

Whether Buy-Rite Oil Company, Inc. is an owner and/or an operator of underground storage tanks located at the Byron Mobil Mart, Byron, Minnesota

within the meaning of Minn. Rule 7150.0030, Subparts 32 and 34, and whether the proposed nonforgivable penalty of \$3,834 for violations pertaining to those tanks is reasonable.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On July 25, 1994, the Minnesota Pollution Control Agency issued an Administrative Penalty Order (APO) against Buy-Rite Oil Company, Inc. in the amount of \$10,000. Of this total, \$6,166 was forgiven and \$3,834 was assessed as nonforgivable.

The APO resulted from an April 12, 1994 inspection and compliance review of the Company's facility in Byron, Minnesota, during which violations of the Agency's Rules pertaining to Underground Storage Tanks (USTs) were found.

2. The Byron, Minnesota property owned by the Company was inspected by Roger Fisher and Beth Endersbe of the PCA on April 12, 1994. The inspectors found various violations of the applicable statutes and rules governing Underground Storage Tanks (USTs), including failure to register one of the tanks with the PCA, failure to measure quantities of product in the tanks daily or before or after deliveries, failure to test for water in the tanks, failure to conduct inventory control tests or to reconcile inventory control data and violations involving not testing the tanks for tightness.

3. Buy-Rite filed a written Notice of Contest on August 24, 1994. In that filing, the Company's President, Al Cusick, contended that Buy-Rite was not the owner/operator of the business inspected on April 12, which business is operated as the Byron Mobil Mart. Mr. Cusick wrote:

" . . . This location is leased to Mr. Dick Archer. While we are the property owners, our lease outlines responsibilities of the tenants to comply with state, federal and local laws and regulations. Most of the items apply to the tenant, Mr. Dick Archer. On 4-12-94, you reviewed with Mr. Archer the items that he needed to do to be in compliance at this site. Several items were not reviewed with me because I am not the owner/operator."

Agency Ex. 15.

4. Buy-Rite organized as a corporation in 1979. Mr. Cusick and his wife, Kaye Cusick, the corporate secretary, are the sole shareholders, the only officers and the only members of the Company's board of directors.

5. Buy-Rite owns five retail petroleum service station properties in Minnesota (a Conoco station in Albert Lea, and Mobils in Byron, Albert Lea, Windom, and Luverne) and leases another Conoco station in New Prague. The majority of these stations are operated by Buy-Rite, which employs approximately twenty people, most of whom work as gasoline convenience store cashiers.

6. The Byron Mobil Mart station property, located at 403 Frontage Road Northeast in Byron, Minnesota, is owned by Buy-Rite. This fact, and those facts listed below, were stipulated to by the parties at the start of the hearing:

- (a) The station premises include a building that is used as a gasoline convenience store and service station for the retail sales of gasoline/diesel products and convenience store items, and five underground storage tanks.

- (b) Buy-Rite Oil Company, Inc. is currently leasing the premises to Richard Archer, d/b/a Byron Mobil Service. Historically, the premises have also been known as Byron Mobil Mart or Buy-Rite Mobil.
- (c) The five underground storage tanks at these premises are used to contain petroleum, including gasoline, diesel fuel and waste (used) oils.
- (d) Buy-Rite Oil Company, Inc. holds title to and possesses and ownership interest in the five underground storage tanks at the premises.

See Joint Ex. 1.

7. Richard (Dick) Archer, the Lessee of the Byron Mobil Mart, leases premises from Buy-Rite and operates the business as a sole proprietorship. He has three employees. Archer has leased the premises since March, 1991. The most recent lease was executed March 16, 1994. In contending that it is not owner and/or operator liable under the APO in this case, Buy-Rite relies on following language, found on page 2 of the lease (Buy-Rite Ex. 17):

"Tenant agrees that its operations on the premises will comply in all respects to requirements of federal, state, county, and city regulations, as applicable. Tenant shall be responsible for and obtain at his own expense all licenses, permits, and other taxes required to be paid on account of the operation of Tenant's business on the premises."

8. In addition to laying out the legal description of the real estate, the lease between Buy-Rite and Dick Archer describes the "premises" owned by the Lessor (Buy-Rite) and leased to Mr. Archer as follows:

"(Legal description of the real estate), which is used as a gasoline convenience store and a service station for the retail sales of gasoline/diesel products and convenience store items, together with all buildings and improvements, equipment and fixtures on and appurtenant to said property, hereinafter sometimes collectively called 'the premises'."

Buy-Rite Ex. 17, p. 1.

At page 4 of the lease, the following sentence appears:

"Attached hereto as Exhibit B is a description of equipment and other property located within the leased premises which is now owned by

Lessor and as to which Lessor retains title through any term of the lease."

Attached to Exhibit B is a list captioned as "Loaned Equipment-Inside". This list includes the item "two gas measuring sticks".

9. Buy-Rite does not challenge the violations specified in the APO, except with the argument that the violations are not its responsibility "based on the lease between the parties". Buy-Rite Exhibit 20. Nor does it challenge directly the determination of the penalty amount or the split between forgivable and nonforgivable portions of the penalty. Rather, it alleges the penalty is unreasonable because it is unable to pay it. As evidence of this, the Company introduced its Federal Corporate Tax Return (Form 1120) for 1992 and the Federal Individual Tax Return (Form 1040) of Alexander and Kaye Cusick for 1993. The Corporate Return reported a negative income of (\$199,484) and the Individual Return reported an Adjusted Gross Income of \$14,138.

This economic evidence was not brought before the Department or the PCA Commissioner during the pendency of the APO, a 3 -month process involving on-site review and the issuance of a Citation, a response to the Citation by the Company, a "Ten-Day Letter" issued by PCA staff laying out every violation upheld by staff after review of the original Citation and response and giving the Company 10 days to respond further, Buy-Rite's response to the "Ten-Day Letter" and on through to the time of issuance of the APO. Inability to pay was not raised as a mitigating circumstance until the day of the hearing, September 22. As a result, the Commissioner did not have the Company's alleged inability to pay before him for consideration as an "other factor as justice may require" in determining penalty amounts under Minn. Stat. § 116.072.

10. Given its limited staff and the large number of USTs statewide, the PCA must limit the issuance of Administrative Penalty Orders, along with other enforcement activities, with a view to affecting the largest number of sites possible. The Agency decided to issue the APO for the hazardous waste violations in this matter to the site's owner (Buy-Rite) and not the station operator because the UST program's compliance efforts, educational and technical assistance programs and registration requirements are directed primarily to tank owners. Also, Buy-Rite owns storage tanks at all of its stations and the staff reasoned that penalizing the owner would effect compliance at the other sites as well as at Byron.

11. Minn. Rule 1400.8550, a procedural rule of the Office of Administrative Hearings specifying the Notice of Hearing requirements in matters of this nature, requires at least 20 days' notice before the hearing. In this instance, the Notice was not issued until September 6, 1994, sixteen days before the hearing. On September 22, Mr. Cusick, acting on behalf of Buy-Rite, orally waived the 20-day notice requirement at the start of the hearing and participated in the subsequent proceedings.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of the Pollution Control Agency have jurisdiction in this case pursuant to Minn. Stat. §§ 14 - 14.62 and Minn. Stat. § 116.072.

2. Notice of the hearing was issued 16 days prior to the hearing, rather than a minimum of 20 days before the hearing. This procedural defect was waived by the parties to the hearing before the start of the hearing on September 22. All other relevant substantive and procedural requirements of law or rule have been fulfilled. Therefore, the matter is properly before the Administrative Law Judge.

3. Any Finding of Fact more properly termed a Conclusion is hereby adopted as such.

4. Buy-Rite Oil Company, Inc. is the "owner", within the meaning of Minn. Rule 7150.0030, subp. 34, of the underground storage tanks located on premises of the Byron Mobil Mart for the purposes of financial responsibility for the Administrative Penalty Order issued by the Commissioner of the Minnesota Pollution Control Agency on July 25, 1994.

5. The nonforgivable penalty assessed in the amount \$3,834 against Buy-Rite Oil Company, Inc. in the Commissioner's Administrative Penalty Order of July 25, 1994 is reasonable within the meaning of Minn. Stat. § 116.072, subp. 2 and 6(c).

6. The Agency's discretionary decision to issue the Administrative Penalty Order in this case to the Company (owner) and not against the station operator, Dick Archer, was neither illegal nor an abuse of its discretion.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of the Pollution Control Agency issue an ORDER declaring Buy-Rite Oil Company, Inc. as the owner of the underground storage tanks located at the premises known as the Byron Mobil Mart for purposes of responsibility and liability for the violations in the Administrative Penalty Order issued on July 25, 1994; and

IT IS RECOMMENDED FURTHER that the nonforgivable penalty of \$3,834 contained in the Administrative Penalty Order issued to Buy-Rite Oil Company, Inc. on July 25, 1994 be AFFIRMED.

Dated this 27th day of October, 1994.

RICHARD C. LUIS
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to send its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped.

MEMORANDUM

The Company's contention that it is not responsible or liable as "owner" for the penalties flowing from violations involving the underground storage tanks at Byron because it has absolved itself by lease is misplaced.

Even if the lease contains clear language providing for such relief and placing responsibility on the Lessee (which is far from clear in the record) any such agreement is between the parties to the lease only and has no effect on who is liable to the State of Minnesota. While the statutes and rules governing USTs do not prohibit private agreements allocating responsibility providing for indemnification, the PCA is under no obligation to comply with such Agreements. The Agency's statutes and rules governing underground storage tanks are clear--the owner and operator of any "underground storage tank systems" are subject to the requirements violated in this case. See Minn. Rule 7150.0010, Subp. 1. As such, the Agency can seek penalty recovery from either the owner or operator, or both. In this case, it has exercised its discretion to seek relief from the owner of the tanks. Nothing in the record or in the arguments of the Company challenges effectively this exercise of discretion.

The Agency's discretionary decision to penalize only the station owner finds support in case law as well. Both Federal and Minnesota Courts have recognized that enforcement actions of governmental agencies are discretionary. See Heckler v. Chaney, 470 U.S. 821, 831 (1985) and Matter of Haugen, 278 N.W.2d 75, 80 n.10, where the Minnesota Supreme Court recognized "that the assessment of penalties and sanctions by an administrative agency is not a factual finding but the exercise of a discretionary grant of power."

It is noted that Buy-Rite stipulated (See Joint Ex. 1) that it owned the premises located at 403 Frontage Road Northeast in Byron and that it holds title to and possesses an ownership interest in the five underground storage tanks at the premises. Minn. Rule 7150.0030, Subp. 34, defines an "owner" as a person who holds title to, controls, or possesses an interest in an underground storage tank. The Company, by stipulation, has admitted that it fits that definition. The lease with Mr. Archer does nothing to change that circumstance.

With respect to the "inability to pay" defense, assuming the Company or its shareholders are unable to pay (and the tax returns admitted as evidence not, of themselves, establish such a fact), the Administrative Law Judge is still unable to recommend relief. He cannot, by statute, recommend a change in the amount of a proposed penalty for hazardous waste violations unless he is able to determine, based on the factors in Minn. Stat. § 116.072, subd. 2, that the amount of the penalty is unreasonable.

An inability to pay fits only factor (6) in the statute, which specifies that the Commissioner of the Pollution Control Agency may consider:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, air, water, land, or other natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation; and
- (6) other factors as justice may require, if the commissioner specifically identifies the additional factors in the commissioner's order.

The fact that the Company or its owners are unable to pay the nonforgivable amount of the violation was not mentioned in the APO under review. Therefore, the Administrative Law Judge cannot recommend relief on such a basis. Considering the issue on its merits, he would also stop short of recommending relief because single tax returns are insufficient evidence from which to conclude that a corporation or individual has no cash or other assets for payment of civil penalties. Income statements, balance sheets, cash flow analyses or bank account records are better indicators of (in)ability to meet an obligation such as that involved here, and the evidence in this case (one corporate tax return, one individual tax return) is too incomplete to allow a balanced assessment of the financial condition of Buy-Rite or the Cusicks.

RCL